

Kaur (Migration) [2020] AATA 5262 (30 September 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Davinder Kaur
VISA APPLICANT:	Mr Maninder Sohal
CASE NUMBER:	1913065
DIBP REFERENCE(S):	BCC2018/5731042
MEMBER:	Mary Urquhart
DATE:	30 September 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 30 September 2020 at 5:14pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – de facto relationship with the sponsor – child of the relationship – parties married while sponsor awaited a divorce – marriage not valid for the purposes of the Act – genuine and continuing relationship – visa applicant tasked with paying family financial accounts – mutual companionship and emotional support - 12-month requirement – compelling and compassionate considerations – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, rr 1.03, 1.15, 2.03; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206
Paduano v MIMIA [2005] FCA 211

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 May 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 19 December 2018 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the applicant did not meet the requirements for the visa.
4. The review applicant appeared before the Tribunal on 18 December 2019, 18 February 2020 and at a resumed hearing on 30 September 2020 to give evidence and present arguments. The resumed hearing was by telephone at the applicants request and in accordance with Covid 19 Tribunal arrangements.
5. The Tribunal also received oral evidence from Ms Bhullar Kulwinder Kaur and from the applicant by telephone from India.
6. The Tribunal was assisted by an interpreter in the Punjabi and English languages.
7. Further submissions provided to the Tribunal include the following:
 - Submission from Maninder Sohal's uncle (Swarn Singh) from India attesting to the relationship together with a copy of Indian passport of Swarn Singh.
 - DNA testing results from Total DNA stating: "Mr Maninder Singh Sohal is the biological father of Ivleen Kaur Sohal to the probability of 99.999999764771%". also, the scientific final report of the DNA test.
 - Email from sponsor dated 9 July 2020 seeking remote hearing. "as we don't know how long COVID-19 Pandemic will take to finish. it can be months or even years."
 - Email dated 7 August 2020 from sponsor seeking priority; "...I am waiting for my case to be heard. I have requested for urgent priority. I has already been 2 years since I am waiting for my application. My child is already in her 9th month and growing without her father's support which is not an issue for migration and AAT, but it is stressing me day n night" (sic).
 - Email from sponsor "I am in more stress these days because of my work. Being a nurse, I am looking after COVID-19 patients. Can't imagine what will happen to my child if I get COVID-19 due to closely working in close contact with them, who will look after my child during my period of isolation...I would have applied for new application but \$7200 is not a small amount where I am struggling to keep balance between my job and my baby's need,"

8. The Tribunal has the benefit of further evidence and information in relation to the circumstances of the parties including documentation regarding the birth of their daughter in November 2019.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

10. **Section 375A section 376 Certificates**

11. The Tribunal explained to the applicant that the Department file contained certificates and notification regarding disclosure of certain information to the Tribunal under ss.375A and 376 of the Act.
12. The Tribunal formed the view that both certificates were valid.
13. The review applicant was handed a copy of the 375A and the Tribunal read a summary of the contents of the certificates out to her. The Tribunal indicated that the 376 certificate indicates the release of information would be contrary to public interest as it could compromise the Departments intelligence gathering tools with serious implications specified. The Tribunal considered it unnecessary to invite the review applicant to comment or respond to the information referred to in the 375A certificate essentially because the Tribunal covered the information at the hearing.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issue in the present case is whether the visa applicant is the spouse of his sponsor as defined.

Whether the parties are in a spouse or de facto relationship

15. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen by grant made 15 June 2016.
16. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.

18. The parties claim they met on 11 March 2018 and that before the date they met they had committed to the relationship having been in touch by telephone since December 2017. They married some 7 days after first meeting in person on 18 March 2018 in a religious ceremony.
19. The evidence is that the review applicant, Ms Kaur was previously married to Mr Gulpreet Singh Gill. They married on 10 November 2008. Ms Kaur made application for divorce. She has provided a copy of a Divorce Order indicating that she was divorced from her previous husband Mr Gurpreet Singh Gill on 14 April 2018
20. According to the extract of marriage certificate provided with the application, the applicant and sponsor married on 18 March 2018. The extract indicates the marriage was solemnized on 18 March 2018 and that it was registered on 17 April 2018. The extract refers to both parties as being “unmarried”. However, on the evidence at the time of the marriage Ms Kaur was still married and was awaiting the decree absolute in relation to her previous marriage.
21. Asked about this Ms Kaur gave evidence that the form did not provide for her circumstances, that is, soon to be divorced. At the hearing Ms Kaur gave evidence that she knew the “divorce was late” as her former husband had not managed to get the documents done in time. She said the date for her marriage to the applicant “was set “and that they went ahead as planned.
22. Ms Kaur gave evidence that she had not informed the applicant of her previous marriage of some 10 years.
23. The Tribunal questioned the applicant about the marital status of himself and his sponsor. Initially he said both were unmarried and that if he thought the sponsor was previously married, he would not have proceeded with the marriage.
24. In later evidence (hearing 30 September 2020) the applicant explained that he was now aware of the previous marriage of the sponsor and accepted the circumstances. The sponsor gave evidence that she had been too frightened to tell him initially but found the right time and all was well.
25. The Tribunal finds that at the time of the marriage the sponsor was still married to her former husband. Accordingly, the Tribunal is unable to be satisfied on the evidence that the marriage is a valid marriage in Australia for the purpose of the application. The parties therefor do not meet the requirements of a married relationship.
26. On the evidence, the Tribunal is unable to be satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
27. As the visa applicant and review applicant are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a married relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB (2).
28. *Are the parties in a de Facto relationship?*
29. ‘De facto partner’ is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual

commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

30. In forming an opinion whether two persons are in a de facto relationship, in relation to an application for a Partner (Temporary) (Class UK) visa, the Tribunal must have regard to all the circumstances of the relationship, including in particular the considerations set out in r.1.15A(3) for spousal relationships and r.1.09A(3) for de facto relationships. These considerations relate to the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other. Each of the specific matters contained in r.1.09A (3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
31. In addition to the criteria set out in Schedule 2 to the Regulations, the Tribunal must be satisfied that the applicant and the person with whom the applicant claims to be in a de facto relationship are both at least 18 years of age: r.2.03A(2). Subject to some exceptions specified in r.2.03A(4) and (5), the Tribunal must also be satisfied for visas of this kind that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless the applicant can establish compelling and compassionate circumstances for the grant of the visa: r.2.03A(3).
32. The issue then is whether the applicant, Mr Sohal, is the de facto partner of Ms Kaur at the time of the visa application and time of decision; and if so whether the parties have been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application; and if not whether the parties can establish compelling and compassionate circumstances for the grant of the visa.

33. *Financial aspects of the relationship*

34. The applicant is not working; he lives in India with his parents and is supported by an elder brother and the sponsor. Ms Kaur gave evidence that she has remitted amounts of money to the applicant for his use. She also explained that she has tasked him with paying financial accounts on behalf of her mother. Her mother is in Australia, is unwell and is awaiting the outcome of a visitor visa extension application. She is usually resident in India. For this reason, the sponsor has entrusted the applicant with some \$2000 AUD to attend to matters for her mother. The evidence regarding the pooling of financial resources is slim however the evidence that the sponsor trusts the applicant with family financial affairs is given weight.
35. The Tribunal notes the parties reside in different countries and as yet have not set in place stronger financial ties. Evidence of intention was discussed. The Tribunal is satisfied there is a financial commitment to each other in the future plans of the couple.

36. *Nature of the Household*

37. The parties have not had an opportunity to set up a household and demonstrate shared responsibilities in this regard. However, in the two, brief periods, the sponsor stayed with the applicant she says she assisted his mother in the house and that she and the applicant shopped and cooked together. There is evidence the parties are in frequent and regular telecommunication contact and enjoy time with their baby daughter. There is evidence of gifts sent to the baby girl from her father and his household. Evidence of plans to establish a household in Australia was given. In his evidence the applicant spoke of his intentions to provide for and to support his daughter and sponsor. The Tribunal is satisfied that the parties have committed to establishing a joint household.

38.

39. *Social Aspects of the relationship*

40. The Tribunal has considered the social aspect of the relationship including whether the parties represent themselves to other people as being married to each other.
41. Evidence was given that family members of the applicant and sponsor attended the wedding including the applicant's brother and sister in law from Alberta, Canada. The sponsor's mother has provided a form 888. A further Declaration has been provided by Mr Swarn Singh and the Tribunal takes it into consideration.
42. A declaration and evidence from Ms Bhullar Kulwinder Kaur were provided. She gave evidence that was inconsistent with that of the sponsor as to when she met the applicant. Her evidence as to how many times she met the applicant was inconsistent with that of the applicant. She claims she met the applicant before the parties married but failed to mention this to the sponsor. Her evidence lacked credibility. The Tribunal gives no weight to the Form 888 evidence or oral evidence of this witness.
43. A Declaration was provided by Mr Harshan Saini, a friend of the applicant's brother. It lacked signature verification documentation. It carries little weight.
44. The Tribunal gives limited weight to the photographic evidence provided. The Tribunal accepts family are aware of the relationship and of the baby daughter of the parties. Given the brief lead up to the wedding and the fact that the parties are living in different countries the Tribunal is prepared to accept the available evidence as going to social recognition of the relationship.

45. *Nature of the Persons' Commitment to each other*

46. The Tribunal has overcome initial hesitations regarding commitment and accepts the sponsor has now shared knowledge of her past marriage with the applicant. The Tribunal accepts both parties care for family and for each other and their baby daughter. The Tribunal notes the applicant had a sound knowledge of the sponsor's mother and her medical difficulties. The Tribunal is satisfied that the parties draw companionship and emotional support from each other and consider the relationship as a long-term one. The sponsor gave evidence the parties intend to marry and as well have made an application to register their relationship.
47. The Tribunal is satisfied, having regard to the totality of the circumstances, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship. The Tribunal is satisfied they are living together. The Tribunal is satisfied after considering all the circumstances of the relationship, that the parties were in a de facto relationship at the time of application and time of decision (r.1.09A).
48. Based on the above the Tribunal is satisfied that the requirements of s.5CB(2)(a)-(d) of the *Act* are met at the time of application. The Tribunal further finds that at the time of decision the applicant is in a de facto relationship with the sponsor within the meaning of s.5F(2)(a) - (d) of the *Act* and meets the requirements of cl.820.221(1) of Schedule 2 to the Regulations. Therefore, the applicant meets cl.820.211.
49. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant.

50. Based on the above the Tribunal is satisfied that the requirements of s.5CB (2) were met at the time the visa application was made.

51. *Are the additional criteria for a de facto relationship met?*

52. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A of the Regulations. Both members of the couple must be at least 18 years old: r.2.03A(2).

53. In this case, at the time of application, the applicant and the sponsor were at least 18 years old.

54. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.

55. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12-month requirement.

56. The Tribunal has therefore carefully considered whether the visa applicant has established compelling and compassionate circumstances for the grant of the visa: r.2.03A (3).

57. The expression 'compelling and compassionate circumstances for the grant of the visa' is not defined in the legislation. Having regard to the ordinary meaning of the words, 'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing: see *Paduano v MIMIA* [2005] FCA 211.

58. In relation to the "12 Month rule", the evidence is that the parties first met in person on 11 March 2018 having committed to the relationship in February 2018. They lodged the application on 19 December 2018. On the evidence they do not satisfy the 12-month rule and there is no evidence the relationship is registered with the State of Victoria. The Tribunal is unable to be satisfied the parties meet the 12-month requirement.

59. *Compelling and compassionate considerations*

60. The sponsor is an Australian citizen. She works as a nurse. At present she is caring for her young child, Ivleen Kaur Sohal b. 27 November 2019 and her mother who is unwell. DNA evidence has been presented which supports a finding that the applicant is the child's father. There is evidence of actual and intended joint responsibility for the care and support of the child.

61. The Tribunal is satisfied that the birth of the parties first child is in the circumstances of this application compelling. Accordingly, the Tribunal is satisfied that there are compelling and compassionate circumstances for the grant of the visa and is satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.

62. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

63. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
 - r.2.03A

Mary Urquhart
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in sub regulation (3).
- (3) The matters for sub regulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in sub regulation (2), the Minister may consider any of the circumstances mentioned in sub regulation (3).